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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 03 2007

EAC 04 196 50486

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Readrick
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree.[1] The petitioner seeks employment as a financial specialist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner does not qualify as an alien of exceptional ability and that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner asserts that his advanced degree alone makes him exceptional. In a subsequent brief, counsel asserts that the petitioner qualifies as a member of the professions holding an advanced degree. Counsel then cites a non-precedent decision by this office sustaining the appeal of another financial analyst for the proposition that financial analysts are eligible for the national interest waiver. Finally, the petitioner submits a single witness letter, the first submitted in this matter. For the reasons discussed below, we uphold the director's ultimate decision denying the petition. Neither the petitioner nor counsel has ever addressed the standards set forth in the relevant precedent decision despite being repeatedly advised of these standards by the director. Rather, both the petitioner and counsel rely on assertions that are legally incorrect and emphasize facts that are immaterial.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.

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[1] Counsel initially asserted that the petitioner was a member of the professions holding an advanced degree. In response to the director's request for additional evidence, counsel reiterated that the petitioner holds an advanced degree but explicitly requested "that he be classified as an individual with exceptional ability in the field of Business."

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

As stated in the first footnote of this decision, counsel initially asserted that the petitioner is a member of the professions holding an advanced degree. In response to the director's first request for additional evidence, counsel expressly requested that the petitioner be classified as an alien of exceptional ability but did not properly address the regulatory criteria for that classification set forth at 8 C.F.R. § 204.5(k)(3)(ii).[2] Thus, the director issued a second request for additional evidence requesting evidence relating to those criteria. In response, counsel asserted that the petitioner had already responded to a request and had established his eligibility. The director concluded that the petitioner had not established that he is an alien of exceptional ability. On appeal, counsel reiterates the initial claim that the petitioner is a member of the professions holding an advanced degree. Some of the statements by counsel and the petitioner imply that a member of the professions holding an advanced degree should qualify for a waiver of the alien employment certification upon a showing of exceptional ability alone. As will be discussed in more detail below, the waiver of the alien employment certification is a separate issue. Before we reach the separate waiver issue, however, we must consider whether the petitioner qualifies for the classification sought as *either* a member of the professions holding an advanced degree *or* an alien of exceptional ability.

The petitioner holds a Master's of Business Administration (MBA) from Troy State University. As noted by counsel on appeal, the Department of Labor's Occupation Outlook Handbook, available at www.bls.gov/oco, states that a baccalaureate is the minimum requirement for financial analysts. As such, the petitioner's occupation falls within the pertinent regulatory definition of a profession. *See* 8 C.F.R. § 204.5(k)(2). The petitioner thus qualifies as a member of the professions holding an advanced degree.

As the petitioner qualifies for the classification sought, the issue of whether he might also qualify for classification as an alien of exceptional ability is moot. More specifically, Citizenship and Immigration Services (CIS) *may* waive the alien employment certification for *both* aliens of exceptional ability *and* advanced degree professionals *in the national interest*. Nevertheless, it is worth noting that both the law and the relevant regulations directly and unequivocally contradict the petitioner's appellate assertion that his MBA alone demonstrates his exceptional ability. Section 203(b)(2)(C) of the Act expressly states that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall *not* by itself be considered sufficient evidence of exceptional ability. Thus, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria to be

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[2] Counsel listed three purported requirements for aliens of exceptional ability, only two of which derive from the six requirements set forth in the regulation at 8 C.F.R. § 204.5(k)(3)(ii). While counsel listed the requirement relating to salary or remuneration, the petitioner did not submit any evidence of his salary or other remuneration.

used in evaluating whether the alien has a degree of expertise significantly above that ordinarily encountered in the field. Consistent with section 203(b)(2)(C) of the Act, possession of a degree is only one of the regulatory criteria, of which an alien must meet *at least three.*

As the petitioner qualifies as a member of the professions holding an advanced degree, the next and separate determination is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise...." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. We note that the director advised the petitioner and counsel of this standard on three occasions: in two requests for additional evidence and in the director's final decision. Despite this notice, neither the petitioner nor counsel has ever addressed the considerations set forth in that decision.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director concluded that the petitioner had not addressed any of the standards set forth in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215. On appeal, counsel and the petitioner reiterate claims regarding the petitioner's eligibility for classification under section 203(b)(2) of the Act without acknowledging the higher showing required for aliens seeking a waiver of the job offer requirement inherent to that classification. The implication throughout this proceeding is that an alien's exceptional ability alone can warrant a waiver of the alien employment certification in the national interest. Section 203(b)(2)(A) of the Act states that visas shall be made available to advanced degree professionals *and* aliens of exceptional ability *whose services are sought by an employer in the United States*. Section 203(b)(2)(B) of the Act provides for a discretionary waiver of the job offer in the national interest. We must presume that, by stating an explicit requirement for aliens of exceptional ability and then allowing for a discretionary waiver, Congress did not mandate that that requirement be waived for all aliens of exceptional ability. This reasoning is clearly explained and emphasized in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. The AAO stated:

> Because, by statute, *"exceptional ability" is not by itself sufficient cause for a national interest waiver*, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F).

Id. (Emphasis added.) Later in the decision, the AAO once again stated that exceptional ability, by itself, does not justify a waiver of the job offer/alien employment certification requirement. *Id.* at 222. Thus, the main basis of eligibility asserted by both counsel and the petitioner is legally flawed. Nevertheless, we will consider the evidence submitted under the proper standard.

The petitioner's proposed employment is as a financial specialist. The petitioner did not list the non-technical description of the job on the petition as required in Part 6. Counsel's initial cover letter does not explain what the petitioner intends to do, the position's substantial intrinsic merit or how the benefits of this employment would be national in scope. In response to the director's request for additional evidence, counsel explains that the petitioner is working as a sales associate/account administrator in the Capital Management Group at Wachovia Securities. The petitioner was also seeking a second Master's degree. The petitioner's duties for Wachovia included assisting senior investment advisors, monitoring and providing quotes on the stock markets and clients' accounts, executing fund transfers, facilitating communication with clients and serving as a point of contact with the accountants of clients. Counsel asserts that the petitioner's employment will "substantially benefit prospectively the national economy of the U.S." On appeal, the petitioner submits a letter from [redacted] a professor of management and strategic planning at Hofstra University, who asserts that the petitioner was subsequently promoted and now provides more direct services to clients.

We are persuaded that the petitioner's proposed employment does have substantial intrinsic merit. In evaluating whether any proposed benefits would be national in scope, however, we must consider the following guidance:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Matter of New York State Dep't of Transp., 22 I&N Dec. at 217, n.3. Under this analysis, it would appear that assisting senior investment advisors or even directly advising clients would provide benefits that would be so attenuated at the national level as to be negligible. Neither the petitioner nor counsel has expressly asserted otherwise or explained how the petitioner will impact the field of financial analysis nationally.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Prior to appeal, the petitioner submitted his academic credentials, recognition from his employer, his unpublished baccalaureate thesis in an unrelated field and the academic requirements for the proposed employment. None of this evidence related to the petitioner's influence in the field. For example, the petitioner did not submit evidence that he has authored published articles on finance, presented his financial or business theories at major conferences or comparable evidence. The record did not include letters from his employers confirming his role with them or letters from independent financial analysts who have been influenced by the petitioner.

On appeal, counsel relies on a non-precedent decision by this office. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Regardless, we note that the alien in the matter on which counsel relies had published articles presenting original research with "phenomenal" implications. While the decision submitted on appeal may demonstrate that this office has looked favorably on financial analysts in the past, it is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217.

Also on appeal, the petitioner submits the above-mentioned letter from Mr. Charnov. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating reference letters, we note that letters containing mere assertions of skill and qualifications for a specific job are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

While independent of the petitioner, [redacted] does not appear to have ever heard of the petitioner or his work prior to being contacted for a reference letter. [redacted] asserts that his opinion is based on an analysis of the petitioner's resume and academic transcripts. In reaching his conclusion, [redacted] evaluates the petitioner's education, including his class standing, and work experience. [redacted] notes that the petitioner is pursuing a second Master's degree and notes that additional education allows an individual to be a better and smarter worker. Finally, [redacted] concludes that the petitioner is well qualified to work in the field and would be an asset to any employer seeking a professional with business experience.

Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219, n.6.

In addition, simple training or unusual knowledge, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221. Furthermore, with regard to experience, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, length of experience, while relevant, is not dispositive. *Id.* at 222.

Finally, the petitioner asserts that the challenges he faces in the job market are "exacerbated" by his lack of permanent residency and that his pending degree will allow him to provide a broad range of services. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for self-petitioning aliens to avoid the inconvenience of the labor certification process. *Id.* at 223. Moreover, the petitioner must be eligible as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). We cannot consider "facts that come into being only subsequent to the filing of a petition." *Matter of Izummi,* 22 I&N Dec. at 176 (*citing Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981). Regardless, assuming that a second Master's degree would be indicative of a degree of expertise significantly above that ordinarily encountered, it would serve to meet one of the regulatory criteria for aliens of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A). As stated above, that classification normally requires an alien employment certification. We cannot conclude that meeting one of the regulatory criteria for that classification, of which an alien must meet at least three, warrants a waiver of that requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.